A

SIVARASA RASIAH & ORS

v.

CHE HAMZAH CHE ISMAIL & ORS

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
JEFFREY TAN JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-01(IM)(NCVC)-252-2011]

C

26 JULY 2011

CIVIL PROCEDURE: *Striking out - Action - Appeal against - Action for wrongful arrest, detention and malicious prosecution - Triable issues - Whether arose - Whether pleadings disclosed causes of action - Whether issues capable of resolution only after taking viva voce evidence - Whether appropriate case for striking out*

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TORT: *Wrongful arrest - Action for - Striking out - Appeal against - Action for wrongful arrest, detention and malicious prosecution - Triable issues - Whether arose - Whether pleadings disclosed causes of action - Whether issues capable of resolution only after taking viva voce evidence - Whether appropriate case for striking out*

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The appellants were amongst a group of people (including members of the public, lawyers, human rights activists and

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journalists) who had participated in a peaceful walk along Jalan Tuanku Abdul Rahman to Central Market in Kuala Lumpur in conjunction with the International Human Rights Day. During the event, the appellants were physically arrested by different arresting officers upon the orders and instructions of the first respondent.

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The appellants were detained overnight and charged the following day at the Sessions Court Kuala Lumpur under ss. 143 and 145 of the Penal Code and alternatively under ss. 27(5)(a) and 27(4) of the Police Act 1967. The Sessions Court found that the prosecution had failed to establish a *prima facie* case and acquitted

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and discharged the appellants. Subsequently, the appellants filed the present action against the respondents, *inter alia,* the following causes of action, namely (i) wrongful arrest and wrongful detention and (ii) malicious prosecution. The respondents filed an application *vide* summons in chambers to strike out the writ of summons and

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statement of claim pursuant to O. 18 r. 19(1)(a) and (b) of the

Rules of the High Court 1980. The Judicial Commissioner (JC) allowed the respondent's application to summarily strike out the appellants' action against all the respondents on the sole ground that the appellants had failed to cite the arresting officers who were the tortfeasors responsible for the alleged arrest as parties to the action, as required under ss. 5 and 6 of the Government Proceedings Act 1956 (GPA) and affirmed by the Federal Court in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* ('the requirements'). Dissatisfied, the appellants appealed against the said decision. The appellants contended that (i) the said requirements had been complied with by the appellants naming the first respondent, who had given the orders and instructions for the arrests, as parties to the action; (ii) the said requirements were only applicable where the action was against the Government of Malaysia (the fourth respondent in this present case) and (iii) the JC had failed to take into account that the appellants' action also included a claim for malicious prosecution against the respondents

Held (allowing the appeal)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The oral orders and instructions given by the first respondent to arrest were sufficient to constitute arrest or to make him as the officer who was responsible for the alleged tortuous act (*ie*, the arrest) as found in the *Lay Kee Tee* case. The individual arresting officers merely obeyed and followed the orders and instructions of the first respondent and could not disobey (s. 20(1) of the Police Act 1967). The first respondent may be the correct tortfeasor herein. Thus, the appellant's contention on this issue was not totally without merit. There were issues of fact for the trial court to scrutinise and determine how and in what manner the orders and instructions were made by the first respondent; to determine whether the first respondent had cause to arrest and if the cause was reasonable. Clearly, these issues could not be summarily disposed of by way of affidavits in a striking out application. (paras 21, 23)

(2) The appellants contended that even if the learned JC was to strike out the suit against the third and fourth respondents, as the appellants had not named the tortfeasor as alleged, the suit could still proceed against the first and second

respondents (without the Government of Malaysia as a party). This was another issue that needed to be tried. It was an issue of law that needed elaborate argument and mature consideration. Further, the learned JC had also failed to consider the malicious prosecution claim by the appellants in the same suit. It was another cause of action by the appellants as appeared in the statement of claim, where if the appellants succeeded, damages would ensue. It was a question for trial on evidence whether the appellants were able to prove their case or not. (paras 24, 25 & 26)

(3) There were a number of relevant issues that needed to be tried and evidence to be adduced at trial for determination of the whole claim by the appellants against the respondents. The pleadings clearly disclosed some causes of action or raised some questions fit to be decided by the judge at trial; the mere fact that the case was weak and not likely to succeed at the trial was no ground for the claim to be struck out summarily under O. 18 r. 19 of the Rules of the High Court 1980. There were several issues of fact that were capable of resolution only after taking *viva voce* evidence. This was obviously not an appropriate case for striking out summarily. (para 29)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu dari kalangan sekumpulan orang (termasuk orang awam, peguam-peguam, aktivis-aktivis hak asasi manusia dan wartawan) yang telah mengambil bahagian dalam demonstrasi jalan berdamai dari Jalan Tuanku Abdul Rahman ke Pasar Seni di Kuala Lumpur sempena Hari Hak Asasi Manusia Antarabangsa. Semasa acara tersebut, perayu-perayu telah secara fizikal ditahan oleh beberapa pegawai-pegawai menangkap yang berbeza atas perintah dan arahan responden pertama. Perayu-perayu ditahan semalaman dan dituduh pada hari berikutnya di Mahkamah Sesyen Kuala Lumpur di bawah ss. 143 dan 145 Kanun Keseksaan dan secara alternatif di bawah s. 27(5)(a) dan 27(4) Akta Polis 1967. Mahkamah Sesyen mendapati bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* dan telah melepaskan dan membebaskan perayu-perayu. Seterusnya, perayu-perayu memfailkan tindakan ini terhadap responden-responden, antara lain, kausa-kausa tindakan berikut, iaitu (i) penangkapan salah,

penahanan salah dan (ii) pendakwaan niat-jahat. Responden-responden memfailkan permohonan melalui saman dalam kamar untuk membatalkan writ saman dan penyataan tuntutan di bawah A. 18 k. 19(1)(a) dan (b) Kaedah-Kaedah Mahkamah Tinggi 1980. Pesuruhjaya Kehakiman (PK) membenarkan permohonan responden untuk membatalkan secara terus tindakan perayu-perayu terhadap responden-responden semata-mata atas alasan bahawa perayu-perayu gagal menyebut pegawai-pegawai menangkap yang pelaku-pelaku tort bertanggungjawab untuk penangkapan yang didakwa sebagai pihak-pihak kepada tindakan, seperti yang diperlukan di bawah ss. 5 dan 6 Akta Prosiding Kerajaan 1956 (APK) dan disahkan oleh Mahkamah Persekutuan di dalam *Kerajaan Malaysia & Ors v. Lay Kee Tee* ('keperluan-keperluan'). Tidak puas hati, perayu-perayu merayu terhadap keputusan tersebut. Perayu-perayu berhujah bahawa (i) keperluan-keperluan tersebut telah dipatuhi perayu-perayu kerana perayu-perayu telah menamakan responden pertama, yang telah memberi perintah dan arahan untuk penangkapan-penangkapan, sebagai pihak-pihak kepada tindakan; (ii) keperluan-keperluan tersebut hanya boleh digunapakai di dalam tindakan terhadap Kerajaan Malaysia (responden keempat di dalam tindakan ini) dan (iii) PK telah gagal mengambil dalam pertimbangan tindakan perayu-perayu juga termasuk tuntutan pendakwaan niat jahat terhadap responden-responden.

Diputuskan (membenarkan rayuan)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Perintah dan arahan oral yang diberi oleh responden pertama untuk membuat penangkapan adalah mencukupi untuk membentuk satu penangkapan atau untuk menjadikan beliau sebagai pegawai yang bertanggungjawab untuk perbuatan tort yang didakwa (penangkapan) seperti di dalam kes *Lay Kee Tee*. Pegawai-pegawai menangkap masing-masing hanya taat dan mengikut perintah dan arahan responden pertama dan tidak boleh mengingkari (s. 20(1) Akta Polis 1967). Responden pertama boleh menjadi pelaku tort yang betul di sini. Oleh itu, hujahan perayu mengenai isu ini mempunyai merit. Terdapat isu-isu fakta untuk mahkamah bicara meneliti dan menentukan bagaimana dan apa cara perintah dan arahan dibuat oleh responden pertama; untuk menentukan sama ada responden pertama mempunyai kausa untuk menangkap dan sama ada

kausa itu adalah munasabah. Dengan jelas, isu-isu ini tidak boleh terus dilupuskan melalui afidavit-afidavit di dalam permohonan pembatalan.

(2) Perayu-perayu berhujah bahawa jika yang arif PK membatalkan guaman terhadap responden ketiga dan keempat, kerana perayu-perayu tidak menamakan pelaku tort seperti yang didakwa, guaman masih boleh diteruskan terhadap responden pertama dan kedua (tanpa Kerajaan Malaysia sebagai salah satu pihak). Ini adalah lagi satu isu yang perlu dibicarakan. Ia adalah isu undang-undang yang memerlukan hujah yang rumit dan pertimbangan matang. Seterusnya, yang arif PK juga telah gagal mempertimbangkan tuntutan pendakwaan niat-jahat oleh perayu-perayu di dalam guaman yang sama. Ia adalah lagi satu kausa tindakan oleh perayu-perayu yang terdapat di dalam pernyataan tuntutan, di mana jika perayu-perayu berjaya, gantirugi diberikan. Ia adalah satu soalan untuk perbicaraan atas bukti sama ada perayu-perayu telah membuktikan kes mereka atau tidak.

(3) Terdapat beberapa isu yang relevan yang perlu dibicarakan dan keterangan yang perlu dikemukakan di perbicaraan untuk penentuan seluruh tuntutan oleh perayu-perayu terhadap responden-responden. Pliding jelas mendedahkan kausa-kausa tindakan atau menimbulkan pelbagai persoalan yang patut diputuskan oleh hakim di perbicaraan; fakta bahawa kes itu adalah lemah dan tidak mungkin berjaya di perbicaraan bukanlah alasan untuk terus membatalkan tuntutan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Terdapat beberapa isu fakta yang mampu diresolusikan hanya selepas mengambil keterangan *viva voce*. Ini jelas bukan kes bersesuaian untuk dibatalkan dengan terus.

Case(s) referred to:

Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors. [2009] 1 CLJ 663 FC ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***

Shaaban & Ors v. Chong Fook Kam & Anor [1969] 1 LNS 170 PC ***(refd)***

Wui Kuang Liang v. Government of Malaysia & Anor [2006] 6 CLJ 512 HC ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, ss. 5, 6
Penal Code 1967, ss. 143, 145
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b)
Police Act 1967, ss. 20(1), 27(4), (5)(a)

Other source(s) referred to:
Alkin's Encyclopedia of Court Forms in Civil Proceedings, 2nd edn., vol. 25, 1998 Issue, p. 400, para 2

For the appellants - Edmund Bon Tai Soon; M/s Faiz & Co
For the respondents - Azizan Md Arshad (Habibah Haron & Andi Razalijaya with him) SFC's; AG's Chambers

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S-21 NCVC-53-2010]

[Editor's note: For the High Court judgment, please see Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2011] 1 LNS 496.]

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by the appellants against the decision of the learned High Court judge dated 6 April 2011, allowing the respondents' application to summarily strike out the appellants' writ of summons and statement of claim pursuant to O. 18 r. 19(1) of the Rules of the High Court (RHC) 1980 with costs of RM3,000.

Brief Facts

[2] On 9 December 2007, the appellants were amongst a group of people (including members of the public, lawyers, human rights activists and journalists) who had participated in a peaceful walk along Jalan Tuanku Abdul Rahman to Central Market in Kuala Lumpur in conjunction with the International Human Rights Day which falls on 10 December every year.

[3] During the event, the participants, including the appellants were ordered to disperse by the Commanding Officer of the Police Personals at the scene ie, the 1st respondent, Che Hamzah Che

Ismail. The appellants however disregarded the order to disperse. The 1st respondent then ordered and caused the arrests of the appellants. (There was however an issue that the arrests were made 10 minutes before the time allowed to disperse had ended). It was not disputed that all the appellants were physically arrested by different arresting officers upon the orders and instructions of the 1st respondent.

[4] The appellants were detained overnight and charged the following day at the Sessions Court Kuala Lumpur under ss. 143 and 145 of the Penal Code and alternatively, under ss. 27(5)(a) and 27(4) of the Police Act 1967.

[5] At the close of the prosecution case, the Sessions Court found that the prosecution had failed to establish a *prima facie* case and acquitted and discharged all the appellants. The prosecution did not appeal against the said acquittal.

[6] On 8 December 2010, the appellants filed the present action against the respondents, *inter alia* for the following causes of action, namely:

(a) wrongful arrest and wrongful detention; and

(b) malicious prosecution.

[7] On 15 March 2011, the respondents filed an application *vide* summons in chambers to strike out the writ of summons and statement of claim pursuant to O. 18 r. 19(1)(a) and (b) of the RHC 1980. On 6 April 2011, the learned Judicial Commissioner (JC) allowed the respondents' application with costs. Hence the present appeal.

[8] The learned JC allowed the respondents application to summarily strike out the appellants action against all the respondents on the sole ground that the appellants had failed to cite the arresting officers who were the tortfeasors responsible for the alleged arrest as parties to the action, as required under ss. 5 and 6 of the Government Proceedings Act 1956 (GPA) and affirmed by the Federal Court in *Kerajaan Malaysia & Ors. v. Lay Kee Tee & Ors.* [2009] 1 CLJ 663. The learned JC held that the tortfeasors must therefore be the arresting officers, but not the 1st respondent, who was the commanding officer of the day in question (although the orders and instructions to arrest came from the 1st respondent).

The Appellants' Case

[9] The appellants contended that the requirements under ss. 5 and 6 of the GPA and affirmed in the case of *Lay Kee Tee* had been complied with by the appellants in filing the present action, by naming the 1st respondent who had given the orders and instructions for the arrests, as parties to the action. To the appellants the real tortfeasor in the circumstances of the case was the 1st respondent and not the arresting officers who were merely acting on his orders and did not exercise their independent judgment.

[10] The appellants further argued that the learned JC had summarily struck out their whole action only on the ground of failure to comply with ss. 5 and 6 of the GPA and the Federal Court decision in *Lay Kee Tee*, but had failed to take into account that the appellants' action also included a claim for malicious prosecution against the respondents, as their additional cause of action.

[11] The appellants also complained that the requirements under ss. 5 and 6 of the GPA and the decision of the Federal Court in *Lay Kee Tee* are only applicable where the action is against the Government of Malaysia (the 4th respondent in the present case). In the present case, even if the appellants had failed to comply with ss. 5 and 6 of the GPA and the decision in *Lay Kee Tee*, the learned JC could only strike out the claim as against the 4th respondent (the Government of Malaysia). The action could still have been proceeded with against the 1st and 2nd respondents (without the Government of Malaysia as a party).

The Respondents' Case

[12] The respondents argued that the arresting officers, and not the 1st respondent, were the tortfeasors and since they had not been named as parties, the appellants had failed to comply with the requirements under ss. 5 and 6 of the GPA and therefore the claim ought to be struck out.

Decision Of The Court

[13] The principles for striking out pursuant to O. 18 r. 19 of the RHC 1980 are well settled. In *Bandar Builder Sdn Bhd & 2 Ors. v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, the Supreme Court ruled:

A The principles upon which the Court acts in exercising its power under any of the four limbs of Order 18 rule 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clard Ltd*), and this summary procedure can only be adopted when it B can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG to Duchy of Lancaster v. L* 7 NW Rly Co) …

[14] A striking out application is not a trial on affidavits. It is not C an application where the parties have to adduce evidence to establish the merits of their case. The court should not conduct a minute examination of the documents and the facts of the case. So long as the claim on the face of it discloses some cause of action or raises some question fit to be tried it should not be D struck out. The mere fact the case is weak and not likely to succeed is no ground for the pleadings to be struck out.

[15] A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and E mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial. (see: *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305 – Federal Court).

[16] The test for striking out as laid down by the Supreme Court F in *Bandar Builder*'s case is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word "unsustainable" but also on the word "obviously" ie, the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If G one has to go into a lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.

[17] In the present case, the respondents contended and the H learned JC agreed, that the appellants' writ and statement of claim should be summarily struck out, alleging non-compliance with ss. 5 and 6 of the GPA as the appellants had not named the individual arresting officers (who physically executed the arrests) as defendants in the suit.

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[18] The appellants on the other hand claimed that the arresting officer was the one who gave the orders and instructions to arrest and he had been named as defendant in the suit; ie, the 1st respondent, and therefore the appellants had complied with the requirement under ss. 5 and 6 of the GPA as well as the Federal Court's decision in *Lay Kee Tee*.

[19] The crux of the matter is really – who is the tortfeasor in the present case? Was it the 1st respondent who ordered and instructed the arrest of the appellants or was it the individual arresting officers who were responsible for effecting the arrests based on the orders and instructions of the 1st respondent?

[20] In interpreting ss. 5 and 6 of the GPA, the Federal Court in *Lay Kee Tee* held:

> On the proper construction of ss. 5 and 6 of the Act 359, in any claim in tort against the government, the officer who was responsible for the alleged tortuous act must be made a party and his liability established before the government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established.

[21] The appellants submitted "the officer who was responsible for the alleged tortuous act" ie, the arrests in the present case can be the 1st respondent who ordered and instructed the arrests to be made on the appellants. In the criminal case notes of evidence at the Sessions Court Kuala Lumpur (where all the appellants were charged, tried and later acquitted and discharged) the 1st respondent stated categorically that he made the decision to arrest and the arresting officers were carrying out his orders. On this point this court agrees with the appellants that under the circumstances the 1st respondent may be the correct tortfeasor in this case. The oral orders and instructions given by the 1st respondent to arrest were sufficient to constitute arrest or to make him as the officer who was responsible for the alleged tortuous act (ie, the arrest) as found in the Federal Court's decision in *Lay Kee Tee* case. The individual arresting officers merely obeyed and followed the orders and instructions of the 1st respondent. This was admitted by the 1st respondent in his evidence before the Sessions Court Kuala Lumpur in the criminal case against the appellants. The individual arresting officers were merely carrying

out the orders and instructions of the 1st respondent and could not disobey the said orders and instructions under s. 20(1) of the Polis Act 1967, which provides:

> (1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superior officers in the Force.

[22] To support their contention on this point, the appellants cited the decision of the Privy Council in *Shaaban & Ors. v Chong Fook Kam & Anor* [1969] 1 LNS 170, where it was held:

> An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It occurs also when by words or conduct he makes it clear that he will, if necessary, use force to prevent the individual from going where he may want to go.

(Shaaban case was adopted with approval in *Jayaraman Velayuthan & Ors v. PP* [1982] 2 CLJ 464; [1982] CLJ (Rep) 130 and *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154).

[23] This court finds that the appellants' contention on this issue is not totally without merit. There are issues of law that need to be elaborated and argued in great detail and for mature consideration. There are also issues of fact for the trial court to scrutinize and determine how and what manner the orders and instructions were made by the 1st respondent; under what circumstances and in what manner the arrests were affected by the individual arresting officers on all the appellants. It would be also for the trial court to scrutinize the evidence to determine whether the 1st respondent had cause to arrest, and if the cause was "reasonable". These are factual issues relevant to determine whether the arrests were wrongful or not. Clearly, these issues cannot be summarily disposed off by way of affidavits in a striking out application. This is not an appropriate case to be summarily struck out under O. 18 r. 19 of the RHC.

[24] The above issue on who was responsible for the arrests is relevant only to the claim for wrongful arrests on the appellants. Under ss. 5 and 6 of the GPA and the decision in *Lay Kee Tee*, this issue relates to the position of the Government of Malaysia

as the 4th defendant in the suit, but the learned JC had struck out the action against all the respondents. The appellants contended that even if the learned JC was to strike out the suit against the 3rd and 4th respondents, as the appellants had not named the tortfeasor as alleged by the Senior Federal Counsel for the respondents, the suit could still proceed against the 1st and 2nd respondents (without the Government of Malaysia as a party). The appellants contended that it was the 1st respondent who issued orders and instructions to arrest all the appellants and later initiated the prosecution against all of them.

[25] This is another issue that needs to be tried. The appellants' contention on this issue is not totally without merit. It is an issue of law that need elaborate argument and mature consideration.

[26] On reading the grounds of judgment by the learned JC, it is clear that the learned JC had failed to consider the malicious prosecution claim by the appellants in the same suit. It is another cause of action by the appellants as appears in the statement of claim, where if the appellants succeed, damages would ensue. It is a question for trial on evidence whether the appellants are able to prove their case or not.

[27] Paragraph 23, of the statement of claim at pp. 44-46 of the appeal records sets out the lengthy particulars of the malicious prosecution claim. The 1st respondent, whom the appellants claimed to be the main tortfeasor in the malicious prosecution claim, has been named as a party. The appellants contended that it was the 1st respondent who had initiated the prosecution of the Appellants which led to the criminal case against them at the Sessions Court Kuala Lumpur. From the pleadings and submissions of counsels, it is clear that both questions of fact and law arise that cannot be resolved without a trial. Only at trial the appellants may be able to prove that:

(a) the respondents initiated the process of prosecution against the appellants which led to the criminal case in the Session Court Kuala Lumpur;

(b) the prosecution terminated in favour of the appellants (ie, they were acquitted in the criminal case);

(c) the respondents initiated the prosecution maliciously;

A (d) there was no reasonable and probable cause for the prosecution; and

(e) the appellants have suffered damages.

(see: *Alkin's Encyclopedia of Court Forms in Civil Proceedings,* 2nd edn. Vol. 25, 1998 Issue, p. 400, para 2).

[28] On this issue the court is in agreement with Clement Skinner J (now JCA) in his decision in *Wui Kuang Liang v. The Government of Malaysia & Anor* [2006] 6 CLJ 512, where the plaintiff's claim in that case was for malicious prosecution. The learned judge held:

> Here, the Appellant's cause of action is for malicious prosecution, the success or failure of which action will depend on whether or not it can be shown that the second Respondent instituted or carried on the proceedings maliciously or whether there was an absence of reasonable and probable cause for the proceedings, which are questions that give rise to issues of mixed fact and law which are dependent for their resolution on all the circumstances and evidence that are disclosed at a trial. Such questions are not suitable to be decided on disputed facts in the affidavits of the parties, and certainly cannot be decided by merely looking at the pleadings only on an application under the first limb of O. 14 r. 21(1)(a) of the SCR.

Conclusion

[29] Based on the above considerations, this court unanimously is of the view that there are a number of relevant issues that need to be tried and evidence to be adduced at trial for determination of the whole claim by the appellants against the respondents. The pleadings clearly disclose some causes of action or raised some questions fit to be decided by the judge at trial; the mere fact that the case is weak and not likely to succeed at the trial is no ground for the claim to be struck out summarily under O. 18 r. 19 of the RHC. There are several issues of law that require mature consideration; and there are several issues of fact that are capable of resolution only after taking *viva voce* evidence. This is obviously not an appropriate case for striking out summarily.

[30] Therefore, the appeal is allowed with costs in the cause. Deposit to be refunded.